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81-2191

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT J. MAYBERRY,
Petitioner,

v.

WILLIAM DEES, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals acted contrary to this Court's decision in *Mt. Healthy City Board of Education v. Doyle*, when it required petitioner to carry the burden of proving not only that speech protected by the First Amendment was a substantial cause of respondent's decision to deny him tenure, but also that he would have been granted tenure in the absence of that speech.

2. Whether the court of appeals adopted rules that violate the fundamental principles this Court has established to define the respective functions of judges and juries, when it weighed the evidence for itself and in the course of doing so:

a. held that an issue cannot be submitted to a jury if in the court's view the evidence on that issue is evenly balanced; and

b. determined that the evidence was not sufficient to support the jury's verdict by means of a "statistical" analysis, assigning arbitrary numerical values to the plaintiff's likelihood of success on two factual issues, and multiplying them together to obtain a single numerical value that the court found was "less than a scintilla."

LIST OF PARTIES

In addition to the parties named in the caption, the following persons were defendants in the district court, were appellees and cross-appellants in the court of appeals, and are respondents here:

William Friday
Robert Morgan
Leo W. Jenkins
Robert L. Holt
Robert W. Williams
Richard Capwell
Joseph Fernandez

There were no other parties to this proceeding in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert J. Mayberry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on November 5, 1981.

OPINIONS BELOW

The judgment of the district court is unreported; it is printed herein as Appendix C (50a-53a). The opinion and order of the district court denying the parties' post-judgment motions is also unreported; it is printed herein as Appendix B (38a-49a). The opinion of the court of appeals is reported at 663 F.2d 502 (CA4 1981), and is reprinted herein as Appendix A (1a-37a).

JURISDICTION

The court below entered judgment on November 5, 1981, Appendix D (54a), and denied a timely petition for rehearing on December 28, 1981, Appendix E (55a). On March 18, 1982, Chief Justice Burger extended the

time for filing this petition to and including May 27, 1982, Appendix F (56a).

This Court has jurisdiction to review the judgment of the court of appeals by certiorari, pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I, provides in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment VII, provides as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Federal Rules of Civil Procedure, Rule 38(a), provides:

> The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

STATEMENT OF THE CASE

In the spring of 1972 petitioner Robert J. Mayberry, a faculty member in the department of romance languages of East Carolina University ("ECU"), was denied tenure by respondents, all of whom were ECU officials. ECU is a state university located in Greenville, North Carolina. Petitioner filed this action, alleging that

the denial of tenure had been motivated by his exercise of rights protected by the First and Fourteenth Amendments to the U.S. Constitution.[1] The case was tried to a jury in 1978, and the jury returned a verdict in favor of Mayberry, finding, on special interrogatories, both that Mayberry's protected speech was a substantial cause of the denial of tenure and that respondents would not have taken the same action in the absence of that speech. The court of appeals set aside the jury's verdict on the ground that the evidence was not sufficient to support those findings.[2] The rules that the court announced as grounds for its action are the subject of this petition. Given that procedural posture, it is necessary to set forth briefly the evidence that supports the jury's verdict on the two issues pertaining to the causal relation between the protected speech and the denial of tenure.

The Evidence Relating to the Causation Issues

In the fall of 1971, ECU launched a "Self-Study" in preparation for its decennial accreditation by the Southern Association of Colleges and Schools. One of the subjects covered by the Self-Study was departmental organization and administration, and each department was instructed to form an internal committee to study that subject. Mayberry's department chairman, respondent Fernandez, named four persons to serve on that com-

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[1] The action was brought pursuant to 42 U.S.C. § 1983, and the District Court's jurisdiction was founded on 28 U.S.C. §§ 1331 and 1343.

[2] The court of appeals also set aside the jury's verdict in favor of Mayberry on an independent claim for breach of contract under state law, based on allegations that in several particulars defendants' actions had violated the ECU faculty manual. The grounds that the court of appeals relied upon for doing so were the same grounds that it used to set aside the verdict on the First Amendment claim (36a-37a n.43). Accordingly, the arguments set forth in Part II of this petition apply equally to the First Amendment claim and the pendent state claim.

mittee: Fernandez himself, his wife, the wife of another department chairman, and a student.[3]

Mayberry for some time had believed that Fernandez was becoming increasingly more autocratic and eliminating many elements of faculty self-governance and academic freedom within the department. Mayberry saw the Self-Study as an opportunity for faculty members to bring these problems to the attention of higher-level administrators. When he learned of Fernandez's appointments to the organization and administration committee, however, he concluded that Fernandez had "stacked" the committee to stifle such criticism. Concerned about the integrity of the Self-Study and the long-range interests of the department, Mayberry took several actions to prevent the result he feared. He went from door to door within the department, urging his faculty colleagues individually to voice their concerns in the Self-Study despite the make-up of the committee. He assisted his wife, who was also a faculty member in the department, in writing an anonymous letter to the University-wide steering committee that had the responsibility of overseeing the Self-Study. He followed up his wife's letter by visiting the chairman of the steering committee and expressing his concern in person. Finally, when the time came for faculty members to complete their Self-Study questionnaires and submit them to the departmental office, Mayberry expressed his criticism of Fernandez in the questionnaire that he submitted. That questionnaire, by University design, was unsigned.

Within three months after the completion of the Self-Study, Mayberry received notice that he had been denied tenure based on the recommendation of Fernandez. It

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[3] Mrs. Fernandez and the other department chairman's wife were both members of the faculty of the romance languages department. Unlike many universities, ECU had no policy forbidding employment of husbands and wives in the same department, even where one was chairman of that department.

was undisputed that Fernandez's recommendation was the sole cause of the denial of tenure. The proof at trial thus focused on whether Fernandez, in making that recommendation, meant to retaliate against Mayberry for his critical speech in connection with the Self-Study.

The key evidence at trial was testimony that Fernandez, on three separate occasions, had stated that he would not give tenure to Mayberry because Mayberry was a "troublemaker," referring to the criticism in connection with the Self-Study. The first of those three statements was related by Thomas Williams, a professor in the department. He testified that shortly before the tenure decision he recommended to Fernandez that Mayberry be given tenure. Fernandez responded that "Professor Mayberry was out of the question because he was a troublemaker" (Tr. 177). The second statement was also related by Williams. A few weeks after the first conversation, and shortly after the tenure decision, Williams asked Fernandez to reconsider the denial of tenure to Mayberry. Williams testified:

> At that time, Professor Fernandez said to me, "No. Professor Mayberry was a troublemaker," and then he went on to specify that during the Self-Study, Professor Mayberry had said and made critical remarks about the Department and that he could not have somebody like that tenured in the Department.

(Tr. 177-78). Fernandez made the third statement about six weeks after the denial of tenure. Mayberry's wife testified that Fernandez called her into his office. She directly asked Fernandez why he had recommended that her husband be denied tenure. Fernandez answered by saying that Mayberry was a "troublemaker," who had been "going around the Department stirring up trouble" for Fernandez in connection with the Self-Study.[4]

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[4] The full text of Mrs. Mayberry's account of this statement is as follows:

> I asked why he had been so cruel as to grant me a job and not my husband. He waved a copy of the self-study at me and

Other evidence supported petitioner's allegation that Fernandez acted out of a retaliatory motive. In May 1972, immediately following the denial of tenure, Mayberry complained of that decision within ECU channels. While that complaint was pending, Fernandez called petitioner into his office. He angrily described Mayberry's actions during the Self-Study as "stirring up trouble," and added that if Mayberry continued "to cause him trouble" he would not allow him to complete the academic year but would fire him before his contract expired (Tr. 121-22).

Finally, there was evidence that Fernandez's explanation of his recommendation against tenure was only a pretext. Fernandez testified that his department was over-staffed, and for that reason he could not recommend tenure for Mayberry. Four other faculty members were up for tenure at the same time, however, and he recommended tenure for all of them. He testified that in his judgment Mayberry, of the five, was the least deserving of tenure. Two of those that he recommended for tenure, however, had only master's degrees while Mayberry had a Ph.D., and Fernandez conceded that it was ECU's policy to upgrade its faculty by trying to grant tenure only to persons with doctoral degrees. Fernandez also conceded that he had advised nontenured faculty members the preceding year that they could not expect to be considered for tenure without a Ph.D.

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began reading comments from it. He said "I could read between the lines. I knew who made these comments. I knew your husband was a troublemaker; that it was your husband who was going around the Department stirring up trouble for me and having people make these comments."

"But now, I wonder if maybe you were the one, that you were also critical."

(Tr. 36-37).

The District Court Proceedings

Respondents moved for a directed verdict at the end of Mayberry's case and at the close of all the evidence; both motions were denied, and petitioner's claims were submitted to the jury. The jury returned a verdict on special interrogatories, finding: (1) that the decision not to continue Mayberry's employment was "motivated and substantially caused by [his] criticism of his Department Chairman," (2) that respondents would not have taken the same action in the absence of that criticism; and (3) that Mayberry should recover actual damages, as well as $5,000 in punitive damages from Fernandez as an individual (50a-51a).[5] Respondents moved for judgment notwithstanding the verdict or in the alternative for a new trial. The district court denied the motions, holding that the jury's verdict was supported by the evidence (47a-48a). Respondents appealed this ruling to the Court of Appeals for the Fourth Circuit.[6]

The Decision of the Court of Appeals

The court of appeals reversed the judgment. The court held that Mayberry's criticism of Fernandez in connection with the Self-Study was protected by the First

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[5] The jury was not asked to fix the amount of actual damages; by stipulation of the parties the trial judge fixed the actual damages at the sum of $81,885—the salary that Mrs. Mayberry had earned in the five years between the end of petitioner's employment at ECU and the trial (51a-52a).

[6] Respondents raised several other issues on appeal, and Mayberry cross-appealed on issues pertaining to relief. The only questions that the court of appeals addressed in its decision were (1) whether Mayberry's criticism of Fernandez was protected speech, and (2) whether the evidence was sufficient to support the jury's finding that Mayberry's rights were violated.

Amendment (14a, 34a-35a), but concluded that the evidence was not sufficient to support the verdict for Mayberry on the question whether that protected speech was the reason for Fernandez's recommendation to deny tenure. On the latter issue—the causal relation between the speech and the denial of tenure—the court held that Mayberry had to carry the burden of proof on two factual issues: (1) that respondent Fernandez knew about the protected speech before making the recommendation to deny tenure, and (2) that without the protected speech Mayberry would have been given tenure (18a-19a). With that holding as a predicate, the court of appeals examined the record and held that on each of these issues considered alone the evidence was weak or inadequate, and that, in any event, with the two issues combined in a "statistical" analysis—assigning numerical values to Mayberry's likelihood of success on each of the two issues and multiplying them together—the probability that petitioner's allegations were true on both issues was too small to support the jury's verdict. In order to understand the court of appeals' decision, it is necessary to describe briefly the essential steps in the court's analysis.

1. The court held that the testimony describing Fernandez's admissions was not sufficiently probative to support the jury's verdict on either of the two issues. Rejecting Mayberry's contention that the jury properly could find that Fernandez had admitted his unconstitutional motive, the court held that that argument was "simply too thin, considering the evidence as a whole" (15a). To the court, Fernandez's remarks were "*much more probative*" of respondents' contention that Fernandez had not learned of Mayberry's criticism until after the denial of tenure (*id.*; emphasis added).[7]

[7] This statement was made in support of the court's rejection of the second and third admissions, but not of the first (which preceded the recommendation to deny tenure and thus could not be explained as evidence of after-acquired knowledge). The court of

2. Disregarding the testimony of Fernandez's out-of-court admissions, the court stated that the only evidence relevant to the issue whether Fernandez knew of Mayberry's protected speech at the time of his recommendation was Fernandez's admission on the witness stand that he "possibly" knew (12a, 14a).[8] The court of appeals held that this in-court admission was not sufficient to support the jury's verdict, saying that an issue on which the evidence is evenly balanced cannot be submitted to the jury:

> A statement that one possibly knew implies that he possibly did not know, leaving things very close to an even balance. Chief Judge Sobeloff put it well

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appeals ruled out the first admission as a basis for the jury's verdict on the different ground that while Fernandez used the word "troublemaker" on that occasion to describe his reason for not giving Mayberry tenure, he did not explain at that time what he meant by it (12a). The court said that there was "no showing" that Fernandez used that word in reference to the Self-Study criticism (*id.*).

[8] That admission was made in the following context. In the course of his direct examination, Fernandez testified that he did not learn of petitioner's criticisms until after he had recommended denial of tenure. The district court interposed and asked a series of pointed questions:

> THE COURT: Had the tenure decision been made when this information came to your attention?
>
> THE WITNESS: Yes, sir. The memorandum—
>
> THE COURT: (Interposing) I am not talking about the memorandum. I am talking about any information that had been critical of you.
>
> THE WITNESS: It had been made in my mind.
>
> THE COURT: Had any information that this Plaintiff Mayberry had been critical of you come to your attention before your decision concerning his tenure?
>
> THE WITNESS: Possibly, yes. (Tr. 287-88).

At 12a-13a the court of appeals quoted Fernandez's later attempt to explain this admission.

> when he observed that an issue can only be submitted to the jury when it is supported by "[e]vidence which shows a 'probability' and not a mere 'possibility.'"

(14a-15a).

3. After similarly weighing the evidence on the issue whether Mayberry would have been granted tenure in the absence of his protected speech,[9] the court of appeals looked at the two issues in combination. The court assumed that the evidence "on either factor, standing alone, while weak, still . . . would have sufficed for a jury verdict in Mayberry's favor" (18a). The court then used a "statistical" analysis to determine whether the evidence was adequate to carry petitioner's burden on the two issues combined. It assigned a 5% "value" to petitioner's likelihood of success on one issue, and 8% to the other, then multiplied them together.[10] That

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[9] The court of appeals found that the evidence on this issue strongly favored respondents. *See* 14a, 19a, 30a n.35. The court gave particular emphasis to an evaluation signed by Fernandez in May 1971 (but not mentioned in his testimony) that stated, "If reduction in staff is forced upon us, would hesitate to give [Mayberry] tenure. Otherwise, would not object" (7a). Because Fernandez testified that departmental overstaffing in 1972 made it necessary to deny tenure to one of the five candidates and that in his opinion Mayberry was the least worthy of the five candidates (13a n.19), the court of appeals concluded that there was "an abundance of proof" and a "strong probability" that Mayberry would have been denied tenure in any event (19a; 30a n.35). (As we show in note 17, *infra*, all of this evidence depended on Fernandez's credibility.)

[10] It is not entirely clear from the court's opinion what likelihood the probability figures were supposed to reflect. The court seemed at one point to refer to the likelihood that petitioner could satisfy the jury that his contentions were true (*see* 18a), and at another point to refer to the likelihood that those contentions in fact were true (*see* 19a). The difference is immaterial, however, because the method of analysis is invalid in either case (*see* pages 20-22, *infra*).

process yielded a value of 0.004 for "the causality percentage of the case." To the court, that figure was "less than a scintilla" and required the conclusion that petitioner had not met his burden of proof (18a-19a).[11] The court summarized its holding on this point by saying:

> All in all, therefore, *both obstacles in Mayberry's path, combined, have proven too much for him to overcome*, even assuming that, had but one of them existed, his evidence would have been sufficient to surmount it.

(19a; emphasis added).

REASONS FOR GRANTING THE WRIT

The court of appeals refused in this case to follow this Court's established rules in two crucial respects. First, its ruling that Mayberry had the burden of proving that he would have been granted tenure in the absence of his protected speech is directly contrary to the rules this Court adopted in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). Second, the court of appeals refused to follow the fundamental principles that this Court has fashioned to govern the allocation of functions between judges and juries in the federal courts.

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[11] The passage in which the court of appeals described this analysis reads as follows:

> Let us, as best we may, recognizing that we thereby substitute an apparent simplicity for an actual complexity, assign values of 5% and 8% likelihood respectively. If one of them had been at the virtual certainty level, the case would hold at the 5% to 8% range of probability. But both were far from the virtual certainty level, and multiplication of the two, one against the other, yields a figure of less than .005. That is, the causality percentage of the case, for which Mayberry, as plaintiff, had the burden of proof was but 4/10ths of 1%. Put another way, it is 99.6% certain that denial of tenure was not associated with the protected criticism. In the real, everyday world, the residual 4/10s of 1% is less than a scintilla, and the case falls for failure of proof.

(18a-19a; footnote omitted).

Specifically, the court of appeals weighed the evidence as if it were sitting as the trier of fact and, in the course of doing so, announced two rules that expressly contemplate such a weighing of the evidence. The first is a rule that was long ago disapproved by this Court, that a jury verdict cannot stand if the court weighs the evidence and finds it evenly balanced. The second is a new rule that uses numerical probabilities in a way that violates principles of both law and statistics. The decision of the court of appeals is squarely at odds with the governing precedents of this Court, and if allowed to stand, will have the effect of permitting, if not requiring, the district courts in the Fourth Circuit to usurp the jury's function.

I. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE DECISION OF THIS COURT IN *MT. HEALTHY CITY BOARD OF EDUCATION V. DOYLE*

In *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), this Court adopted rules to govern allocation of the burden of proof in cases exactly like this one. The Court held that the plaintiff's burden is to prove by a preponderance of the evidence that speech protected by the First Amendment was a "substantial" or "motivating" factor in the defendants' decision not to renew his employment. 429 U.S. 287. If the plaintiff carries that burden, the defendant may attempt to prove that "it would have reached the same decision as to [plaintiff's] re-employment even in the absence of the protected conduct." *Id.* The burden is on defendants to prove this second proposition by a preponderance of the evidence. *Id.* No different rule applies in the case of a decision to deny tenure; in *Mt. Healthy* itself a decision to renew would have conferred tenure on the plaintiff, and the Court took this factor into account in deciding where to lay the burden of proof. *Id.* at 286.

The jury in this case was properly instructed in accordance with the rules of *Mt. Healthy*, and petitioner's brief in the court of appeals clearly described those rules

and their application here.[12] Nonetheless, the court of appeals did not follow *Mt. Healthy*, but instead imposed upon Mayberry the burden of proving by a preponderance of the evidence, as part of his case in chief, that he would have been granted tenure in the absence of his protected speech.[13] The other courts of appeals have rendered decisions in a large number of cases under the rules announced in *Mt. Healthy*; this is the only court of appeals decision that has refused to follow this Court's ruling.[14]

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[12] The jury instructions appear at Tr. 523-25; the petitioner's discussion of the issue is in Reply Brief for Plaintiff-Appellant, at 14-16.

[13] The clearest statements of the court's assignment of this burden to Mayberry appear in the "causality" section of the opinion and at the end. As we described above, at page 8, when the court undertook its "statistical" analysis, it identified two elements of "the causality percentage of the case, for which Mayberry, as plaintiff, had the burden of proof" (19a) but had failed to prove: one of those elements was petitioner's likelihood of receiving tenure in the absence of the protected speech (18a). Later in the opinion, the court cited *Mt. Healthy* and discussed it, stating that because of petitioner's "failure to prove essential items of [his] case in chief" the question of a "burden shift" to defendants did not arise (30a n.35). Finally, in holding petitioner's speech protected, the court further underscored its assignment of the burden to petitioner, saying:

> We are loath to say that there was no First Amendment dimension whatever to utterances by Mayberry so that, *even had the evidence sufficed to support a finding that, if Mayberry's criticisms had not been made, Fernandez demonstrably was prepared to recommend him favorably for tenure*, still Mayberry could not have recovered.

(35a; emphasis added). *See also* 14a, 34a.

[14] The same basic issue was raised in the petition for certiorari in *Connick v. Myers*, No. 81-1251, *petition for cert. granted*, 50 U.S.L.W. 3715 (Mar. 8, 1982). In *Connick* the lower courts applied the *Mt. Healthy* rule, and the petitioner's third "question presented" appeared to seek reconsideration of the *Mt. Healthy* burden-of-proof rules. The petitioner's brief in *Connick* has now been filed, and it does not argue for reconsideration of those rules. Brief for Petitioner in No. 81-1251, at 12-14.

II. THE RULES THAT THE COURT OF APPEALS ADOPTED AS GROUNDS FOR OVERTURNING THE JURY VERDICT IN THIS CASE VIOLATE THE FUNDAMENTAL PRINCIPLES THAT DEFINE THE RESPECTIVE ROLES OF JUDGES AND JURIES IN THE FEDERAL SYSTEM.

The most fundamental principle in the federal system concerning the allocation of functions between judge and jury is that it is the exclusive province of the jury to weigh the evidence. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 700-01 (1962); *Tennant v. Peoria & P. U. Ry.*, 321 U.S. 29, 35 (1944). In order to preserve the jury's exclusive right to resolve disputed issues of fact, this Court has fashioned rules that restrict the inquiry of the trial court when it is called upon to take a case away from a jury by directed verdict or to set aside a verdict by judgment n.o.v. The same rules that govern the trial court's decision in regard to those motions also govern the inquiry of a court of appeals in reviewing the grant or denial of a directed verdict or judgment n.o.v.[15] *See Continental Ore Co., supra*, 370 U.S. at 696 n.6; *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940); 9 Wright & Miller, Federal Practice & Procedure § 2524, at 541-42 (1971). Under those rules, the role of the court is not to decide how it would weigh the evidence if it were in the jury's place, but only to determine whether the record contains probative facts that rationally support the jury's verdict, *Myers v. Reading Co.*, 331 U.S. 477,

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[15] The practical difference, of course, is that on motion for directed verdict the district court is to decide whether the evidence properly could support a verdict for the opponent of the motion, while on motion for judgment n.o.v. the question is whether the evidence properly supports the verdict that the jury reached. The discussion in text is cast primarily in terms of setting aside a verdict—since that is what the court of appeals did here—but the rules the court announced would lead equally to a decision to take the issue away from the jury in the first place by directing a verdict.

485 (1947), giving the evidence all the inferences that can reasonably be drawn consistent with the verdict. *Continental Ore Co., supra*, 370 U.S. at 696; *Galloway v. United States*, 319 U.S. 372, 395 (1943). If the record does contain probative evidence that supports the jury's verdict, the existence of contrary evidence—no matter how persuasive it may be to the court—is irrelevant. *Lavender v. Kurn*, 327 U.S. 645, 652-53 (1946); *Corinne Mill, Canal & Stock Co. v. Toponce*, 152 U.S. 405, 408-09 (1894). These principles are, at least in part, guaranteed by the Seventh Amendment. *Galloway v. United States, supra*, 319 U.S. at 394-96.

The court of appeals departed from these fundamental principles in this case. Its basic error was in weighing the evidence for itself. In doing so, the court of appeals not only violated these fundamental principles itself, but it also announced two rules of law that have the effect of authorizing the lower courts to violate them as well.

A. Throughout its opinion the court engaged in a frank process of weighing the evidence to its own satisfaction: rejecting evidence that supported the jury's verdict as "very weak" (14a) or "attenuated" (19a), or as entitled to "[n]o great weight" (16a); and concluding that evidence contrary to the jury's verdict constituted an "abundance of proof" (30a n.35), or established a "strong probability" (19a). The court's treatment of Fernandez's three admissions of improper motive is the clearest example—and the one most crucial to the outcome—of the court's weighing of the evidence.

Under the established rules for review of jury verdicts, the jury was entitled to believe the testimony of petitioner's witnesses that Fernandez on three occasions had admitted that Mayberry's protected speech was his reason for not recommending tenure.[16] That testimony, if

[16] Although in the first of the three statements Fernandez did not explain his use of the term "troublemaker," he explicitly re-

believed by the jury, was enough by itself to support the jury's finding that Mayberry's protected speech played a substantial part in Fernandez's decision to recommend denial of tenure. It was likewise probative on the "same decision anyway" question framed by *Mt. Healthy*. Fernandez's credibility was crucial to the contention that Mayberry was denied tenure due to overstaffing because he, among the five candidates for tenure, was the least worthy. If the jury resolved the credibility question against Fernandez and found that he had admitted an improper motive, it could properly infer from that fact alone, or in combination with other relevant evidence, that Fernandez's assertion that petitioner was the "least worthy" candidate for tenure was only a pretext.[17]

The court of appeals did not hold that the jury was somehow foreclosed from drawing these inferences from

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ferred to petitioner's Self-Study activities in explanation of the term "troublemaker" in the second and third statements. The jury was entitled to infer that his use of that word meant the same thing on all three occasions.

[17] All of the evidence respondents offered in support of this contention depended on Fernandez's credibility. Fernandez's conclusory statement that Mayberry was the least worthy candidate for tenure was not backed up by any specific testimony comparing Mayberry to the other candidates. Although respondents placed in evidence several anonymous evaluations of Mayberry by other faculty members, of whom some recommended tenure and some did not (6a-7a), they did not offer the corresponding evaluations of the successful tenure candidates. Moreover, those anonymous evaluations could not furnish evidence on this issue independent of Fernandez's credibility; because of the obvious hearsay problems, they were not admitted to prove the truth of their contents, but only for the limited purpose of showing that "the statements were made and were before Dr. Fernandez and considered by him for whatever they were worth in making his determination if you [the jury] find that he made any reference to them at all." (Tr. 366). Finally, in regard to the evaluation that Fernandez signed in May 1971 (*see* note 9, *supra*), the jury's apparent decision not to credit it may be explained by the fact that Fernandez did not mention that evaluation in his testimony, not even so much as to identify the document.

the admissions. Nor did it even pretend to adhere to the rule requiring it to give Mayberry the benefit of all reasonable inferences in support of the jury's verdict. Instead, by indulging its own interpretation of the testimony and finding that the evidence of Fernandez's admissions was "much more probative" of respondent's contentions than of petitioner's (15a), the court usurped the jury's exclusive function. As this Court has unequivocally held:

> Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Tennant v. Peoria & P. U. Ry., supra, 321 U.S. at 35.

B. The "even balance" rule that the court announced in the course of weighing the evidence is just a thinly veiled justification for substituting the court's assessment of the evidence for that of the jury. For that reason, the proposition that the court of appeals announced—that a court must direct a verdict when it finds that the facts give equal support to both sides—has been discredited by this Court and rejected by most of the lower courts that have addressed it.

In *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333 (1933), this Court held that where the facts give equal support to two inconsistent hypotheses, they prove neither, and judgment as a matter of law must go against the party with the burden of persuasion. *Id.* at 339-40. A number of courts have interpreted *Chamberlain* to mean that a trial court can direct a verdict if it believes the evidence to be evenly balanced.[18] On the facts of *Chamberlain*, however, the Court's statement can be regarded instead as a holding that the evidence in that case could not rationally support a conclusion that the

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[18] See note 21, *infra*.

plaintiff had carried his burden of proof.[19] That interpretation of *Chamberlain* is compelled in view of this Court's later holding in *Tennant v. Peoria & P.U. Ry. Co.*, *supra*. In that case the Court held that in a jury trial the law does not allow a court to weigh the evidence for itself to decide whether it believes the evidence is evenly balanced. In a passage that seems to be addressed specifically to *Chamberlain*, but which does not cite it, the Court said:

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences.

321 U.S. at 35. Despite *Tennant*, some courts have interpreted *Chamberlain* to authorize taking a case away from the jury if the court believes the evidence to be in equipoise. On one occasion when a court of appeals set aside a jury verdict on that ground, this Court granted certiorari and reversed the judgment summarily. *Carolina Life Ins. Co. v. Williams*, 210 F.2d 477 (CA5), *rev'd without opinion*, 348 U.S. 802 (1954).

The "even balance" rule announced by the court of appeals in this case authorizes what *Tennant* forbids. In

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[19] It is well accepted that if the trier of fact finds that the evidence is in equal balance, it must return a verdict against the party with the burden of persuasion. *See, e.g., Phillips v. SEC*, 388 F.2d 964, 970-71 (CA2 1968). In addition, if a trial court concludes, without weighing the evidence and after giving the party with the burden of proof the benefit of all rational inferences, that the evidence does not give the jury any grounds for a rational conclusion that the burden of proof has been satisfied, the trial court can properly direct a verdict against the party who has that burden. *See, e.g., Epoch Producing Corp. v. Killian Shows, Inc.*, 522 F.2d 737, 744-45 (CA2 1975), *cert. denied*, 424 U.S. 955 (1976); *Haldeman v. Bell Tel. Co.*, 387 F.2d 557, 559 (CA3 1968); *Aluminum Co. of America v. Preferred Metal Prods.*, 37 F.R.D. 218 (D.N.J. 1965), *aff'd*, 354 F.2d 658 (CA3 1966).

light of Fernandez's in-court admission that he "possibly" knew of the protected speech when he made his recommendation, resolution of the question of Fernandez's knowledge rested in large measure on his credibility. Assessing his credibility was exclusively a function for the jury, and the court of appeals could not find the evidence on the knowledge issue evenly balanced without judging Fernandez's credibility for itself. The "even balance" rule applied by the court of appeals thus squarely contradicts the holding of *Tennant*.

The court of appeals in this case is not the only court to make this error. Even though a majority of the lower federal courts have understood that this Court's modern decisions do not allow such a practice,[20] other courts from time to time have used *Chamberlain* to justify setting aside a jury verdict when they found the evidence gave equal support to both sides.[21] In this state

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[20] *See, e.g., Wratchford v. S. J. Groves & Sons Co.*, 405 F.2d 1061, 1067 (CA4 1969); *Yeager v. J. R. Christ Co.*, 364 F.2d 96, 100 (CA3 1966); *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 592 n.8 (CA2 1961); 9 Wright & Miller, Federal Practice and Procedure, § 2528, at 567-69.

[21] *See, e.g., Pittman v. West American Ins. Co.*, 299 F.2d 405, 411 (CA8 1962); *Jellison v. Kroger Co.*, 290 F.2d 183, 185-86 (CA6 1961); *Ford Motor Co. v. Mondragon*, 271 F.2d 342, 345 (CA8 1959); *Armstrong v. Commerce Tankers Corp.*, 311 F.Supp. 1236, 1240-41 (S.D.N.Y. 1969), *aff'd on other grds*, 423 F.2d 957 (CA2 1970), *cert. denied*, 400 U.S. 833 (1971). There are other cases in which a court cited the *Chamberlain* rule as the law, but did not apply it to overturn a jury verdict. *E.g., South-East Coal Co. v. Consolidated Coal Co.*, 434 F.2d 767, 777 (CA6 1970); *Calvert v. Katy Taxi, Inc.*, 413 F.2d 841 (CA2 1969); *Seganish v. District of Columbia Safeway Stores*, 406 F.2d 653, 656 n.21 (CA DC 1968); *Weil v. Keshner*, 300 F.2d 500, 503-04 (CA8 1962). There are yet other cases in which a court cited the *Chamberlain* "equal inferences" rule and overturned a jury verdict, but it is difficult or impossible to tell whether that rule was the basis for the decision. *E.g., Greene v. Morelli Bros.*, 463 F.2d 725, 729 (CA3 1972).

of the law it would be valuable for this Court expressly to hold that *Tennant* limits *Chamberlain* so that *Chamberlain* can no longer be taken to authorize a court to usurp the jury's function by deciding for itself whether the evidence is evenly balanced.

C. The "statistical" technique that the court of appeals invented here is not only unprecedented, but, like the "equal inferences" rule, it fundamentally violates the precept that weighing the evidence is the exclusive prerogative of the jury in the federal system.

Although the use of numbers and statistical techniques gives a superficial appearance of objectivity, the analysis used by the court below is nothing more than another device for the court to reweigh the evidence. There is no way that a court can select numerical values that have an objective relation to the facts of a case; any figures selected for that purpose will be arbitrary figures that merely reflect the court's subjective assessment of the evidence.

Moreover, even if there were an objective way for a court to derive numerical figures without weighing the evidence for itself, such mathematical probabilities have no legitimate role in deciding cases like this one. As this Court has observed, the function of jurors is not to strive for "mathematical certainty," but to apply their cumulative knowledge, wisdom, and common sense to the evidence they are given. *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523, 526 (1956). The likelihood that one party rather than the other will succeed in persuading a jury to its point of view cannot be a factor in a court's assessment whether the facts rationally would support a verdict for either party. The trial judge may think it highly improbable that the jury will believe a particular witness or accept a particular theory of the evidence, but it is not the judge's prerogative to take the case away from the jury based on that improbability.

Finally, even if probability could be determined objectively and had a legitimate role to play, the court's method of combining the probabilities of two issues in order to determine petitioner's likelihood of prevailing on the entire case is totally invalid, both as a matter of law and under principles of statistics.

The law has always determined the sufficiency of evidence by examining separately the evidence relevant to each issue that is material to the outcome of a case.[22] If the evidence, viewed rationally, could support a verdict on each of the necessary issues, the case is submitted to the jury. If the court believes the evidence to be weaker on some issues than on others, that fact is immaterial; it is the jury's responsibility to decide whether it will find for the plaintiff on one issue or on all. The method used by the court of appeals here would change that principle, requiring a determination of the combined likelihood of winning on all the necessary issues as a prerequisite for submission to the jury. The fallacy of this approach can be seen by considering a case in which the plaintiff must prove a number of discrete elements in order to win. If the number of elements is large enough, multiplying together the probabilities on each issue will make it extremely difficult for any plaintiff to get to a jury. It is just like flipping a coin 10 times; even though the probability of getting heads on each toss is 50%, the probability of getting heads on 10 successive tosses is less than 1 in 1,000. In a case with only four discrete issues, if each one were assigned a probability of 25%, multiplication of the probabilities would yield a product of less than 4 in 1,000—by the court's analysis here, "less than a scintilla."

The court's multiplication of the probability figures in this case is, moreover, contrary to accepted principles

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[22] *See, e.g., Tennant, supra*, 321 U.S. at 32-34; *Gunning v. Cooley*, 281 U.S. 90, 95 (1930); *Voegeli v. Lewis*, 568 F.2d 89, 94 (CA8 1977).

of statistical analysis. Multiplying separate probabilities to obtain a value for the combined probability of two events is proper only when the two events are independent. *See, e.g.*, L. Cohen, The Probable and the Provable 51-52, 61 (1977); W. Hays, Statistics 42-44 (3d ed. 1981).[23] In this case, as in many cases, the issues are not independent, but are linked because they depend to a large extent on the same evidence and the credibility of the same witnesses. The question of Fernandez's knowledge, and the question whether Fernandez would have recommended tenure for plaintiff in the absence of the protected speech, both rested substantially on Fernandez's testimony. Because the jury's view of his credibility would influence the outcome of both issues, they were not independent. *See id.*, at 42-43. Multiplying the probabilities of those two issues, therefore, is statistically improper.

If the court of appeals' decision is allowed to stand, the rule of law applicable in the Fourth Circuit will be in fundamental conflict with the decisions of this Court. The district courts in that circuit, if not elsewhere, will be encouraged by the court of appeals' rules to weigh the evidence for themselves and, based upon their own weighing of the evidence, to remove issues from jury consideration or to set aside verdicts once they are returned. The writ of certiorari should be granted in this case in order to maintain conformity with this Court's decisions and to preserve the meaning of the Seventh Amendment's guarantee of the right to jury trial.

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[23] As the sources cited in the text show, a different formula must be used when the events are not independent. *E.g.*, L. Cohen, The Probable and the Provable 61.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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